BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DANE JOB	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,024,311
ASHA DISTRIBUTING	)	
Respondent	)	
AND	)	
	)	
NATIONWIDE MUTUAL INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant appeals the June 8, 2009, Award of Administrative Law Judge Rebecca A. Sanders (ALJ). Claimant was denied benefits after the ALJ determined that claimant had failed to prove that he suffered an accidental injury which arose out of and in the course of his employment with respondent, that claimant failed to provide timely notice of the alleged accident and that there was no just cause for claimant's failure to timely notify respondent of the alleged accident.

Claimant appeared by his attorney, Roger D. Fincher, of Topeka, Kansas. Respondent and its insurance carrier (respondent) appeared by their attorney, John F. Carpinelli, of Topeka, Kansas.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the ALJ. The Board heard oral argument on September 18, 2009.

ISSUES

1. Did claimant suffer an accidental injury on March 8, 2005, which arose out of and in the course of his employment with respondent? Claimant contends that on March 8, while lifting a box, he injured his low back. Claimant then told his supervisor, Scott Graber, respondent's distribution manager, of the accident. Respondent contends that claimant had experienced long term problems with his

low back and the alleged accident did not happen. Additionally, medical records contemporaneous with the alleged accident fail to mention a work injury.

2. Did claimant provide timely notice of the alleged accident? Claimant's contention that he told his supervisor is denied by Mr. Graber. Respondent contends that the actual notice of the accident did not occur until at least April 14, 2005.

3. What is the nature and extent of claimant's injury and disability?

FINDINGS OF FACT

Claimant worked for respondent as a warehouse employee when, on March 8, 2005, he allegedly injured his back while lifting boxes under a rack. Claimant testified that he told his supervisor, Scott Graber, of the injury but still completed his shift that day. Mr. Graber is the only employee of respondent that claimant spoke to regarding the injury for several weeks.

Claimant first sought medical treatment for this injury with Sean Sorell, D.C., on March 12, 2005. Claimant initially presented himself with low back pain, mid back pain and neck pain. The notes of March 12, 2005, indicate that the adjustments improved claimant's pain until the next day, when claimant turned wrong and his back popped. Thereafter, claimant sought treatment with Dr. Sorell on March 14, 15, 17, 23, 26, April 2, and April 7, 2005, with the last treatment on April 7, 2005. At no time do any of the office notes of Dr. Sorell note a work related connection to these complaints. Claimant had sought treatment with Dr. Sorell prior to the date of accident, for low back complaints, on August 21, 2004, September 28, 2004, October 2, 2004, January 4, 2005, and January 8, 2005.

Claimant sought medical treatment next with Cary J. Herl, M.D., on April 8, 2005. Claimant was suffering from low back pain and advised Dr. Herl of the prior chiropractic treatments. Claimant also discussed an automobile accident from1989 but, again, failed to mention a work related accident with respondent. Claimant next saw Dr. Herl on April 14, 2005. On that day, claimant reported that something had happened in the night, because claimant had been fine the day before. There is evidence in this record that claimant moved from an apartment to a house in April 2005. Claimant discussed the move with Mr. Graber sometime before April 13 or 14, 2005. In fact, Mr. Graber offered claimant extra work on April 13, but claimant declined due to the pending move. However, claimant testified that he did no lifting during the move and spent most of the time lying down. This testimony is supported by the testimony of claimant's father, Edward Job.

Until April 14, 2005, claimant had continued to preform his regular job with respondent without limitations or restrictions. On April 14, 2005, claimant contacted Mr. Graber and advised that he was unable to work that day because claimant could not walk. Mr. Graber testified that this was the first time he was made aware that claimant was having any back problems. Mr. Graber denied being told of any accident on or about March 8, 2005. When claimant called Mr. Graber on April 14, he did not mention the reason for the back pain. Claimant just said that he had to go to the doctor. Mr. Graber was also not aware that claimant had been seeing a chiropractor between March 8 and April 14. In fact, claimant had worked on April 13 with no indication that he was having any difficulties. Until April 14, claimant had never missed work or had any no call no shows. During the first week of May, Mr. Graber was contacted by Dan Zuerlein, respondent's operations manager from respondent's corporate office in Omaha, and told that claimant was claiming a work related injury. This was the first time Mr. Graber was made aware that claimant was claiming a work related accidental injury to his back. Claimant did not return to work until May 30, 2005. At that time he was on light duty doing inventory and desk work, with a 20 pound lifting restriction. Claimant remained on light duty the remainder of the time he worked for respondent.

Claimant was referred by his attorney to board certified physical medicine, rehabilitation and spinal cord injury specialist, Lynn Alan Curtis, M.D., on two occasions, the first on July 22, 2005, and again on February 27, 2007. Dr. Curtis diagnosed claimant with a herniated disc at L5-S1 and noted lumbar radiculopathy with lumbar spasm. Claimant was ultimately rated at 17 percent to the whole body for the back complaints pursuant to the AMA *Guides*.[1] Dr. Curtis used the Range of Motion Model rather than the DRE because he felt that claimant had to deal with no treatment over a number of years. If the DRE were used, claimant's rating would be 10 percent to the whole person. Dr. Curtis opined that claimant's impairment stemmed from the March 8, 2005, accident. Dr. Curtis reviewed a vocational report prepared by vocational expert Dick Santner. He found claimant had lost the ability to perform 15 of 23 tasks on the list. However, at his deposition, Mr. Santner eliminated tasks 14 and 23, both of which Dr. Curtis had opined claimant could not do. This results in a task loss of 13 out of 21 for a 62 percent task loss.

Claimant was referred by respondent to board certified occupational and preventative medicine specialist Michael J. Poppa, D.O., for an evaluation on April 7, 2009. Dr. Poppa rated claimant at 10 percent to the whole body pursuant to the AMA *Guides*. He noted that claimant had preexisting back problems, which he considered a preexisting impairment of 5 percent to the whole person, also pursuant to the AMA *Guides*. In reviewing the task list prepared by vocational expert Terry Cordray, Dr. Poppa opined that claimant could not perform 6 of the 22 tasks on the list. This represents a 27 percent task loss. In reviewing the medical records provided, including the chiropractic records from

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[1] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

2004 and 2005, Dr. Poppa noted no mention in any of the records of a work accident causing claimant to seek medical or chiropractic treatment. He did use the earlier records to render the opinion on claimant's preexisting impairment.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[2]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[3]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[4]

Here, the record contains serious conflicts regarding how claimant was injured, whether it was a specific trauma, a series of traumas or several specific lifting incidents. The record contains all of the above descriptions. The record also conflicts regarding claimant's alleged notice to Mr. Graber. First, Mr. Graber denies the notice. Second, the contemporaneous medical records fail to mention a work related injury. Even when claimant was telling Dr. Herl of the 1989 automobile accident, claimant still failed to discuss the alleged work accident. Finally, the medical records from March 14 and April 14 indicate non-work related injuries contemporaneous with the creation of those records. None of the above supports claimant's allegations of a March 8, 2005, injury as being the source of his ongoing physical problems.

The Board finds that claimant has failed to prove that he suffered an accidental injury which arose out of and in the course of his employment with respondent on March 8, 2005. The Award of the ALJ denying benefits is affirmed.

K.S.A. 44-520 requires notice be provided to the employer within 10 days of an accident.

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[2] K.S.A. 2008 Supp. 44-501 and K.S.A. 2008 Supp. 44-508(g).

[3] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[4] K.S.A. 2008 Supp. 44-501(a).

Claimant testified that he told Mr. Graber of the incident on the day it happened and on two occasions thereafter. Mr. Graber denied that these conversations took place. The ALJ had the opportunity to observe claimant testify on two occasions. It is apparent that the ALJ determined that claimant was not a credible witness on this issue. The Board agrees. It is not persuasive to argue that timely notice of a specific accident was provided and yet fail to tell the doctors of a work related accident during visits contemporaneous with the alleged accident.

K.S.A. 44-520 goes on to say:

> The ten-day notice provision provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident . . . .

The ALJ also found no just cause to extend the time for providing notice. Claimant argues that no posters about the 10-day notice requirement were on display at respondent's plant until after the date of accident. This is true, but claimant was aware that notice was required at some point. His argument that he told Mr. Graber fails based on this record. Additionally, to argue that Mr. Graber was told and at the same time argue just cause for not telling Mr. Graber appears disingenuous. The Board affirms the finding by the ALJ that claimant failed to prove that there was just cause for his failure to timely notify respondent of this alleged accident. The award of the ALJ denying claimant benefits in this matter is affirmed.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed. Claimant has failed to prove that he suffered an accidental injury which arose out of and in the course of his employment with respondent, timely notice was not given, and claimant failed to prove that there was just cause for his failure to provide notice in a timely fashion.

The Award sets out findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. The Board adopts those findings and conclusions as its own.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Rebecca A. Sanders dated June 8, 2009, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of September, 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant
John F. Carpinelli, Attorney for Respondent and its Insurance Carrier
Rebecca A. Sanders, Administrative Law Judge